

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CARMEN MILLER, et al.,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 98-0078-B
)	
KENNEBEC COUNTY, et al.,)	
)	
Defendants)	

RECOMMENDED DECISION

Pending before the Court is Plaintiffs' Motion for Default Judgment, Attorney's Fees and Other Sanctions against Defendants Kennebec and Knox Counties, and Lamoreau, Davey and Fuller ["DEFENDANTS"].¹ The memoranda filed by the parties in connection with the Motion reveals the following scenario:

1. On August 12, 1998, Plaintiffs served Interrogatories and Requests for Production of Documents on Defendants' counsel. The responses or objections would have been due on September 11, 1998.
2. On October 6, Plaintiffs conducted the deposition of Defendant Lamoreau. No discovery responses had yet been provided to Plaintiffs, and no motions to enlarge the response deadline had been filed with the Court. For this reason,

¹ The Motion does not state that it applies to Defendants Lamoreau, Davey and Fuller, but the parties indicated during a telephone conference with the Court on December 16, 1998 that it would apply to these employees of Kennebec and Knox Counties.

Defendants' counsel agreed Plaintiffs could reconvene the deposition following receipt of the discovery materials.

3. On October 12, the original discovery deadline, the parties met and informally agreed to file a consented-to motion to enlarge the discovery deadline to November 12, and the motion deadline to November 19. That Motion was filed with the Court, and granted on October 16, 1998.
4. Sometime in mid-October, Defendants' counsel began experiencing medical difficulties.
5. On October 22, (approximately one month and 11 days after the responses were due the Plaintiffs), Defendants' counsel personally delivered the discovery requests to the Knox County Defendants.
6. On October 28, Defendants' counsel told Plaintiffs' counsel the discovery responses were at the printer and would be sent the next morning by Federal Express.
7. Two depositions scheduled for November 3 were cancelled due to Defendants' failure to provide timely responses to Plaintiffs' discovery requests.
8. On November 9, Defendants' counsel asked for new copies of the Requests for Production of Documents and Interrogatories for the reason that his clients had lost the originals.

9. On November 9, 1998, a telephone conference was held to discuss the parties' discovery difficulties. As a result, an Order issued compelling Defendants to respond to Plaintiffs' discovery requests no later than November 16, failing which "the Court [would] consider sanctions including default and monetary payments." Order at 2 (November 9, 1998). Following the conference, Defendants' counsel called the person in Knox County to whom he had delivered the discovery, and learned she was on a two-week vacation.
10. On November 18, Plaintiffs' counsel received a stack of documents containing no reference to the document requests to which they referred.
11. On November 21, five days after the Court-imposed deadline for responding to Plaintiffs' discovery requests, Defendants' counsel experienced computer problems resulting in the loss of all data entered since September 23, 1998.
12. On November 23, Plaintiffs filed this Motion for Sanctions.
13. On November 28, Defendants' counsel forwarded partial responses to Plaintiffs' Interrogatories by e-mail.
14. With the exception of the mutual Motion to Enlarge, Defendants' counsel has made no requests of the Court or the Plaintiffs for an enlargement of time.

15. Defendants' counsel has at no time previously mentioned health or computer problems as a reason for his non-compliance to either Plaintiffs' counsel or this Court.

The Court is satisfied that counsel's conduct in this case warrants the imposition of sanctions. The Court has carefully considered the range of sanctions available, including the entry of default as requested by Plaintiffs, and reluctantly concludes that this case very nearly qualifies for such a drastic remedy. *See, National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976). Nevertheless, the Court believes the appropriate sanction in this case is one which addresses counsel's conduct without penalizing his clients. Accordingly, the Court having found that counsel has engaged in practices that "unreasonably and vexatiously" multiplied this litigation, I recommend that he personally satisfy the excess costs, expenses, and attorneys' fees reasonably incurred because of his conduct. 28 U.S.C. § 1927. The Court does not find that counsel's behavior amounted to subjective bad faith; sanctions are appropriate, however, for behavior that is "more severe than mere negligence, inadvertence, or incompetence" regardless of counsel's subjective intent. *Cruz v. Savage*, 896 F.2d 626 (1st Cir. 1990). This behavior rises to that level.

Conclusion

For the foregoing reasons, I recommend Plaintiffs' counsel be directed to provide the Court with a detailed accounting of all excess expenses, costs and attorneys' fees incurred directly or indirectly as a result of the conduct detailed in this Recommended Decision, which accounting should include the costs and fees associated with this Motion for Sanctions and preparation of the accounting. I further recommend that the Court thereafter impose a sanction based upon that accounting to be personally satisfied by Defendants' counsel.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on March 3, 2000.